

EXHIBIT F

Brief of Defendant-Respondent Santana,
Anderson v. House of Good Samaritan Hosp., 2003 WL 25660444

Michelle ANDERSON, Plaintiff-Appellant, v. HOUSE OF..., 2003 WL 25660444...

2003 WL 25660444 (N.Y.A.D. 4 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Fourth Department, New York.

Michelle ANDERSON, Plaintiff-Appellant,

v.

HOUSE OF GOOD SAMARITAN; Mercy Hospital of Watertown d/b/a Mercy Center for Health Center; Maritza Santa, M.D., David T. Gavan, M.D., Jane L. Hyland, M.D., and Philip Tatnal, M.D., Defendants-Respondents.

No. 1298.

2003.

Brief on Behalf of Defendant-Respondent Maritza Santana, M.D.

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***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
STATEMENT OF CASE	1
QUESTIONS PRESENTED	2
ARGUMENT	
POINT I	
THE PLAINTIFF IS NOT ENTITLED TO DEFENDANT'S REINSURANCE POLICIES OF INSURANCE	3
POINT II	
DOES THE PENNSYLVANIA COMMONWEALTH COURT ORDER STAY THE INSTANT NEW YORK STATE ACTION	6
CONCLUSION	9

***ii TABLE OF AUTHORITIES**

<i>Central Buffalo Project Corp. v. Rainbow Salads</i> , 140 A.D.2d 943 (4th Dep't 1988)	4
<i>Morris v. Clements</i> , 228 A.D.2d 990 (3d Dep't 1996)	3
<i>PCB Piezatronics v. Change</i> , 179 A.D.2d 1089 (4th Dep't 1992)	3
<i>Sprague v. International Business Machines</i> , 120 A.D.2d 514 (2d Dep't 1986)	3

***1 PRELIMINARY STATEMENT**

This is an appeal, brought by the plaintiff/appellant, from that part of an order of the Supreme Court (Schwerzmann, P.), entered in Jefferson County on December 6, 2002, which denied plaintiffs motion for disclosure of all defendants liability, excess and reinsurance policies; denied plaintiff's discovery of defendants' list of staff physicians and holders of staff privileges of the Defendant physicians and information relevant to Dr. Soncrant and Dr. Dorman and applied **Education Law Section 6527** (3) privilege to the production of simple lists showing the physicians had staff status and privileges and to hospital legal business and financial contracts with third parties form emergency room services of doctors involved with the plaintiff. The plaintiff- appellant made a motion for Discovery and Inspection that was returnable on November 12, 2002 (R. 14-19). Thereafter, the defendants in this action served various opposition papers on behalf of their respective clients with respect to the various issues addressed in the plaintiff's motion papers. Based on the lower court's decision(s), the instant appeal was brought by the plaintiff-appellant. On behalf of Dr. Santana, this respondent's brief will be limited to the issue of disclosure of reinsurance policies of insurance and will address the stay applicable to Legion Insurance Company.

STATEMENT OF CASE

This case arises out of care and treatment rendered to the plaintiff at Mercy Hospital between October 12, 1993 and October 23, 1993. It is claimed that the medical providers failed to diagnose plaintiff's acute **encephalitis** resulting in permanent **brain injury**. Dr. Maritza Santana was plaintiff's attending physician during her admission to Mercy Hospital from October 14, 1993 to October 23, *2 1993. The instant action was commenced on or about March 28, 1996. Since that date, discovery has been exchanged between the parties and several depositions have taken place to date.

The Court should note that on or about March 28, 2002, the Pennsylvania Commonwealth Court issued an Order placing Legion Insurance Company into Rehabilitation. (R. 27a). As a result, the Order directed all litigation with respect to Legion Insurance Company insureds be stayed for a 90 day period. (R. 27h). All parties to this action, as well as the Lower Court, were notified of this Order and the stay of the action. (R. 26). Since this date, the stay has been extended numerous times and is currently set to expire on May 30, 2003. As Dr. Santana is a Legion insured, the Order and subsequent stay are only applicable to this defendant, but effects this litigation as a whole. Despite the Order issued by the Pennsylvania Court, the parties to this action have proceeded with discovery in a normal fashion to date.

QUESTIONS PRESENTED

- 1. WHETHER THE SUPREME COURT WAS CORRECT IN CONCLUDING THAT THE PLAINTIFF IS NOT ENTITLED TO A FULL COPY OF DEFENDANTS' FULL REINSURANCE POLICIES AND INDEMNITY.**
- 2. WHETHER THE ORDER OF THE PENNSYLVANIA COMMONWEALTH COURT STAYING ALL SUITS IN WHICH LEGION INSUREDS ARE PARTIES IS APPLICABLE TO THIS PARTICULAR CASE?**

*3 ARGUMENT

POINT I

THE PLAINTIFF IS NOT ENTITLED TO DEFENDANT'S REINSURANCE POLICIES OF INSURANCE.

CPLR §3101(f) provides as follows:

"Contents of Insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of the judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not a reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement."

The plaintiff moved to obtain the contents of Defendants' insurance policies, excess policies of insurance and reinsurance agreements pursuant to CPLR 3101(f) (R.14, 16-19). Thereafter Dr. Santana objected to this demand on the grounds that the plaintiff is not entitled to any reinsurance agreements as these policies of insurance, if they do in fact exist, are not relevant to the instant action at this time. (R. 24, 25).

Although this section of the CPLR may require the production of the contents of an insurance policy that may satisfy part or all of a judgment, it does not specifically speak to the issue of reinsurance policies of insurance. Furthermore,

none of the case law cited by the plaintiff-appellant speaks to the specific issue of disclosure of reinsurance policies of insurance. (Plaintiff-Appellant's Brief at 4-5); *PCB Piezatronics v. Change*, 179 A.D.2d 1089(4th Dep't 1992); *Morris v. Clements*, 228 A.D.2d 990 (3d Dep't 1996); *Sprague v. International Business Machines*, 120 A.D.2d 514 (2d Dep't 1986). The plaintiff previously made a demand for insurance disclosure on Dr. Santana and other defendants to this action. As stated in greater detail below, counsel for Dr. Santana responded *4 to Plaintiff's demand by providing plaintiff with Dr. Santana's primary policy of insurance information, which included the effective dates, policy limits and policy number, as well as excess insurance coverage information. As indicated in Defendant Santana's opposition papers, we have made no objections to providing plaintiff's counsel with a copy of Dr. Santana's primary policy of insurance and/or excess insurance policies and did so in February of 1999. (R. 24). Likewise, Dr. Santana has not objected to such disclosure on the grounds that the requested materials were are privileged or otherwise not discoverable. See, *Central Buffalo Project Corp. v. Rainbow Salads*, 140 A.D.2d 943 Dept. 1988). However, Dr. Santana has refused to provide plaintiff's counsel with copies of any reinsurance policies of insurance that may exist. Defendant Santana's insurance company (Legion Insurance Company) is not a party to the instant action and, as such, the plaintiff is not entitled to any such reinsurance policies.

The plaintiff's argument is essentially that since Dr. Santana's insurance company is under motion for liquidation in a reorganization proceeding, that the excess and reinsurance companies are the "real payors and may claim absence of notice." (Appellant's Brief p. 5). There has been no indication or representation of the above statement made to counsel for the plaintiff. Furthermore, the case law cited by the plaintiff does not address the specific issue of disclosure of reinsurance policy information. The defendant has been more than cooperative in providing plaintiff with the proper disclosure pursuant to CPLR 3101(0 as the plaintiff is well aware of Dr. Santana's policy limits, with respect to her primary policy of insurance and excess insurance coverage.

In a Response to Demand For Documents, dated February 3, 1999, counsel for Dr. Santana provided plaintiff's counsel with a copy of the insurance policy, which was in effect from May 1, *5 1993 through April 30, 1994, together with a copy of the Evidence of Participation for this time period. As noted in the Evidence of Participation, Dr. Santana was insured through Legion Insurance Company, under policy #GL3000001 with policy limits of \$1 million/\$3 million. Dr. Santana also had excess insurance coverage through APA ARG, Inc., effective May 1. 1993 through April 30, 1994, policy number XS000593 with policy limits of \$2 million/\$6 million, which was also disclosed to plaintiff's counsel in this same Discovery Response. It is the defendant's position that plaintiff's motion, with respect to Dr. Santana, is moot. The defendant's position in this case is the same as the Court noted in the dissenting opinion of *PCB Piezatronics v. Change*. The Court noted that the defendants have fully satisfied the requirements of CPLR 3101 (f) when they delivered to the plaintiff a copy of their insurance policy." 179 A.D.2d 1089 (4th Dep't, 1992).

Although Dr. Santana's insurance carrier, Legion Insurance Company, is under motion for liquidation in a reorganization proceeding, there has been no representation to counsel for the plaintiff that the existing primary policy of insurance would not be effective/available once the stay has been lifted. Even so, Dr. Santana's excess insurance policy information has already been provided to plaintiff's counsel, which is by a provider other than Legion Insurance Company. Despite plaintiff's argument that the insurance companies may claim absence of notice, there is no legal basis for this argument as plaintiff was provided with all relevant insurance information in February of 1999. For these reasons, Dr. Santana respectfully requests that the Court uphold that portion of the lower Court's decision that denied plaintiff's request for disclosure of Dr. Santana's reinsurance policy of insurance. As the plaintiff is already in possession of Dr. Santana's primary insurance and excess insurance information, that portion of plaintiff's appeal, as to Dr. Santana, is *6 moot.

POINT II

DOES THE PENNSYLVANIA COMMONWEALTH COURT ORDER STAY THE INSTANT NEW YORK STATE ACTION

Defendant Santana's insurance company, Legion Insurance Company, was placed into Rehabilitation on or about March 28, 2002. The Pennsylvania Commonwealth Court issued an Order placing Legion Insurance Company into rehabilitation and directing that:

"All persons in the Commonwealth or elsewhere, are enjoined and restrained from: (a) instituting or further prosecuting any court action (whether at law, in equity, or otherwise) ?? arbitration or mediation against Legion or the Rehabilitator; (b) obtaining preferences, judgments attachments, garnishments or liens, including obtaining collateral in any litigation, mediation or arbitration involving Legion, the Rehabilitator, or Legion's assets and property...." (R. 27h).

As the Court can see, the Order affects actions against the insurance company's insureds(i.e. Dr. Santana). The Order directed that the above-mentioned stay was to last for a 90 day period. Per this direction, in all cases in which counsel for Dr. Santana represents Legion insureds, letters were sent to the appropriate Courts notifying them of the Rehabilitation and the Pennsylvania Court Order. In correspondence dated July 11, 2002, the parties to this action and the Court were notified that the 90 day stay had been extended for another 90 day period, until approximately September 27, 2002. (R. 26). Since this time, the stay has been extended for several 30 day time periods and is currently stayed until May 30, 2003. Therefore, the Pennsylvania Commonwealth Court Order is still in effect, and as such, if this Court decides to honor the sister state order, this action would be stayed pursuant to the terms of the Rehabilitation Order. From the time of the initial Order until the present, counsel for the plaintiff has proceeded with this case despite the Pennsylvania Order, as the plaintiff *7 has found the order to be ineffective without a New York State adoption of the Order. As the Lower Court did not address this issue in the Decision and Order dated December 5,2002, plaintiff requests that the issue be addressed by this Court. (R. 8-13).

Despite the issuance of the Pennsylvania Order directing the stay of this action, the parties to this action have proceeded with conferences, depositions, and hearings. Discovery in this action has not, in any way, been affected by the Pennsylvania Court Order directing the stay of this action. All the discovery that has taken place during the effective dates of the stay will not be deemed null and void just because it occurred during the time of the Pennsylvania Order. Plaintiff argues that the "status of the Order needs determination by the Court as it contains the threat of undoing all actions" is without merit. All discovery, including paper and depositions of parties, that have taken place during the effective dates of the Order up until the present time, will not be deemed null and void and will not be "undone".

When the Order was first issued, counsel for Dr. Santana notified the relevant lower Court of the Order and subsequent stay referenced in the Order. Since the Court did not formally stay this action pursuant to the Pennsylvania Order, discovery in this action proceeded in a normal fashion. If this Court decides that the Order issued by the Pennsylvania Court should not be honored by the lower Court, we will continue to proceed with discovery. However, counsel for the plaintiff then runs the risk of taking a judgment against Dr. Santana while the insurance company is still in rehabilitation. Plaintiff's counsel is misinformed with respect to the conclusion that all forms of discovery and occurrences (i.e. hearings and the IME of the plaintiff) that have taken place to date, with respect to this action, being "undone". The problem with the Order and the subsequent stay of *8 this action, if not honored at this time, will be an issue at the time of trial when and if a judgment is taken against a Legion Insurance Company insured, namely Dr. Santana.

With respect the Pennsylvania Court Order, Dr. Santana requests that the Court honor the Order which provides for a 90 day stay of this action, which is set to expire or May 30, 2003 and which may be extended thereafter. However, it is also Dr. Santana's position that the decision of whether or not to honor the Pennsylvania Court Order is in the broad discretion of the Court.

Michelle ANDERSON, Plaintiff-Appellant, v. HOUSE OF..., 2003 WL 25660444...

***9 CONCLUSION**

That part of the Lower Court's decision that denied plaintiff's request for disclosure of defendant's reinsurance policy of insurance be affirmed. Defendant Santana has provided counsel for the plaintiff will all relevant disclosure information regarding her primary policy of insurance and excess policy of insurance and therefore this issue is moot.

With respect to the Pennsylvania Court Order directing the stay of this action pending the resolution of Legion Insurance Company's liquidation proceeding, it is Defendant Santana's position that this Court has broad discretion with respect to this issue and may decide to honor the stay or deny the same. As this issue was not formally addressed in the Lower Court's decision it was counsel's understanding that the Lower Court had been proceeding with this matter as if the Order and subsequent stay were not applicable. If plaintiff would like a formal determination by this Court to that effect, than we request that this issue be decided as a result of this appeal.

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